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In The Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN H. STEWART,
Petitioner,

VS.

DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS,
and, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,
LOCAL 235,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX D

Findings of Fact and Conclusions of Law re Defendants' Motions for Summary Judgment.

CASE NO. CV 80-4637CBM(Mx)

Filed July 20, 1983, Clerk, U.S. District Court, Central District of California. Entered July 26, 1983, Clerk, U.S. District Court, Central District of California.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, JOHN H. STEWART, Plaintiff, vs. DISNEYLAND, A Division of Walt Disney Productions, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 235, Defendants.

This action having come on for hearing before the Court on defendants' Motions for Summary Judgment, the Honorable Consuelo B. Marshall, Judge, presiding, on April 5, 1982, and the Court, having considered the papers that have been submitted by the parties, and having heard the oral arguments of counsel, makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff John H. Stewart is a resident of California and a former employee of defendant Disneyland.

2. Defendant Disneyland is a division of Walt Disney Productions, a corporation doing business in California.

3. Defendant General Truck Drivers, Office, Food and Warehouse Workers, Local 952, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, is the successor union ot the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 235 ("Local 235") and is a labor organization.

4. On June 27, 1959, plaintiff was hired by defendant Disneyland as a janitor. While holding this position, plaintiff was subject to the collective bargaining agreement, commonly referred to as the Building Service Agreement, between Disneyland and the Service and Hospital Employees International Union, Local 399.

5. On March 28, 1971, plaintiff transferred at his own request to the position of Oiler-Truck Driver, a position which fell under the jurisdiction of Local 235. While in this position, plaintiff was subject to the terms and conditions of employment, including "seniority," "layoff" and "recall," set forth in the collective bargaining agreement, commonly referred to as the Maintenance Agreement, between Disneyland and the Building and Construction Trades Council of Orange County and individual signatory District Councils of local unions, including Local 235.

6. Prior to his transfer, plaintiff was on notice that such transfer would require the forfeiture of his accrued classification seniority under the Building Service Agreement, and henceforth his new classification seniority date under the Maintenance Agreement would be March 28, 1971, the date of the transfer. Under the Maintenance Agreement to which plaintiff was then subject, classification seniority governed promotion, transfer, layoff and recall.

7. Between October 1972 and January 1973, defendant Disneyland laid off certain employees pursuant to an economic cutback dictated by budget restrictions.

8. Plaintiff was laid off from the position of Oiler-Truck Driver on January 13, 1973, pursuant to the economic cutback.

9. Each of the employees laid off pursuant to the economic cutback, including plaintiff, was, at the time of said layoffs, the least senior employee in his respective classification.

10. Under the Maintenance Agreement, an employee on layoff had a "right to recall" for a period of up to one year from the date of layoff. That right required that employees on layoff would be hired in order of seniority into the position from which they had been laid off, if such position or positions became available within one year. If an employee was not recalled during that period, his recall rights were automatically terminated.

11. During the one year period following plaintiff's layoff, neither plaintiff nor any other employee was hired or recalled into the position of Oiler-Truck Driver, because no such positions became available during that period.

12. Although plaintiff made sporadic telephone inquiries to his former supervisor about the possibility of reemployment both while subject to recall and after his recall rights had expired, he was not led to believe that he had a reasonable expectation of reemployment. Upon each inquiry, plaintiff was truthfully informed that no Oiler-Truck Driver positions were available and that there were no plans to expand the number of positions.

13. Plaintiff's last inquiry about reemployment was made no later than September 1974. At that time, no Oiler-Truck Driver positions were available.

14. The first Oiler-Truck Driver position became available on October 28, 1974, 21 months after plaintiff was laid off and nine months after his recall rights under the Maintenance Agreement had terminated. The position became available because an Oiler-Truck Driver went on extended medical leave, and was filled by the transfer of a current Disneyland employee.

15. Subsequent to the termination of his recall rights, plaintiff never submitted a written application for employment.

16. Nothing about the transfer of a current Disneyland employee to replace an Oiler-Truck Driver in October 1974 suggests that the failure to recall plaintiff nine months after his recall rights had terminated, or at any earlier date, was discriminatory.

17. On January 31, 1975, 382 days after his recall rights had terminated, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC"), alleging that he was discriminatorily laid off and denied recall in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

18. Subsequently, the EEOC issued plaintiff a Right to Sue letter, and plaintiff filed a complaint in this court on October 21, 1980.

19. Defendant Disneyland has demonstrated by overwhelming evidence that plaintiff was laid off and not recalled during the period of his right to recall due to economic constraints rather than to racial discrimination. Plaintiff has not introduced any evidence that casts doubt upon the economic cause of his layoff and non-recall.

20. Defendant Disneyland has further demonstrated by evidence, that plaintiff did not apply for or inquire about rehire at a time when an Oiler-Truck Driver position was available or reasonably expected to be available and that the failure to rehire him was not due to racial discrimination.

21. Any Conclusion of law which properly should be a Finding of Fact, is included herein as a Finding of Fact as though fully set forth.

CONCLUSIONS OF LAW

1. This court possesses jurisdiction over the case at bar pursuant to 42 U.S.C. §§ 2000e-5(f)(1) and (2), and 28 U.S.C. § 1343(4).

2. Summary judgment is proper when the action embodies no genuine issue of material fact. The movant bears the burden of demonstrating the absence of any such genuine issue of material fact. Any doubt as to the existence of a genuine issue of material fact is resolved against the movant. *Adickes v. S. H. Kress & Company,* 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed. 2d 142 (1970). If, however, the "truth is clear", the movant is entitled to summary judgment. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 2d 458 (1962).

3. Defendant Disneyland has demonstrated by overwhelming evidence that plaintiff was laid off and not recalled during the period of his right to recall because of budget constraints. Plaintiff has failed to introduce any evidence that casts doubt upon the economic cause of his layoff and non-recall. *See Wilkerson v. Siegfried Ins. Agency,* 683 F.2d 344 (10th Cir. 1982). Consequently, there exists no genuine issue of material fact regarding the cause of plaintiff's layoff and non-recall. Thus, summary judgment on the merits in Defendant Disneyland's favor is warranted with respect to plaintiff's layoff and rehire claim.

4. Defendants Disneyland and Local 235 moved for summary judgment on the ground that plaintiff did not file a timely charge of discrimination with the EEOC. To be timely, plaintiff must have filed his charge with the EEOC within 300 days of the act of which he complains. 42 U.S.C. § 2000e-5(e); *Delaware State College v. Ricks,* 449 U.S. 250 (1980); *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980); *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1977). This requirement, like a statute of limitations, is subject to waiver, estoppel and equitable tolling. *Zipes v. TWA,* 455 U.S. 385 (1982).

5. Plaintiff alleged in his EEOC charge that he had been laid off and then not recalled as a result of racial discrimination. That charge, filed 382 days after the termina-

tion of his recall rights, was untimely under 42 U.S.C. § 2000e-5(c).

6. The burden of establishing that waiver, estoppel, or equitable tolling excuse for failure to comply with the time requirements set forth in 42 U.S.C. § 2000e-5(c) is on the plaintiff. *Cooper v. Bell,* 628 F.2d 1208, 1214 n.11 (9th Cir. 1980). The circumstances in which such principles will be applied are restricted. *Electrical Workers v. Robbins and Myers, Inc.,* 429 U.S. 229 (1976); *Earnhardt v. Commonwealth of Puerto Rico,* 691 F.2d 69, 71 (1st Cir. 1982); *Cottrell v. Newspaper Agency Corp.,* 590 F.2d 836, 838 (10th Cir. 1979); *Smith v. American President Lines, Ltd.,* 571 F.2d 102, 109 (2d Cir. 1978); *Aljadir v. University of Pennsylvania,* 547 F.Supp. 667, 669 (E.D. Pa. 1982). The Ninth Circuit enumerated three instances where waiver of the filing period might be warranted. First, failure to comply may be justified if the plaintiff had neither official notice nor actual knowledge of the filing period; second, compliance may be excused on general equitable grounds involving conduct or misrepresentation by a third party; and finally, a plaintiff's failure to comply may be justified if he "was unaware that he was the object of the discriminatory conduct." *Villasenor v. Lockheed Aircraft Corp.,* 640 F.2d 207 (9th Cir. 1981); *Earnhardt v. Commonwealth of Puerto Rico, supra; Wilkerson v. Siegfried Insurance Agency,* 683 F.2d 344, 348 (10th Cir. 1982).

7. As a matter of law, the evidence submitted by plaintiff, does not establish that plaintiff had neither official notice nor actual knowledge of the filing period; secondly, the evidence does not establish that plaintiff's delay in filing resulted from some fraudulent concealment or misrepresentation on the part of the defendants; and third, the plaintiff has failed to show that he was misled as to the cause of his dismissal, moreover, the evidence fails to show that plaintiff's dismissal and subsequent failure to be recalled

were racially motivated. The evidence which showed that a white employee was hired nine months after plaintiff's right to recall had expired, does not indicate that plaintiff was the object of discriminatory conduct nor does it show that defendants' actions were racially motivated. The evidence which showed that a white employee was hired nine months after plaintiff's right to recall had expired, does not indicate that plaintiff was the object of discriminatory conduct nor does it show that defendants' actions were racially motivated.

Thus, as a matter of law, the evidence submitted by plaintiff does not establish any justification for equitable extension of the Title VII filing period. Therefore, tolling is inappropriate in this case.

8. Plaintiff's allegations of discriminatory layoff and failure to recall pertain to isolated and discrete acts and are not of a "continuing nature". *Ward v. Caulk,* 650 F.2d 1144, 1147 (9th Cir. 1981); *Griffin v. Pacific Maritime Association,* 478 F.2d 1118 (9th Cir. 1973), *cert. denied,* 414 U.S. 859 (1973).

9. Plaintiff's EEOC charge was untimely and thus plaintiff has failed to comply with a statutory prerequisite to the maintenance of a civil action under Title VII of the Civil Rights Act of 1964.

10. The fact that plaintiff made continuing efforts to be reemployed after the termination of his recall rights does not toll the statutory time period for filing a charge with the EEOC. *Anderson v. Paccar, Inc.,* 528 F.Supp. 181, 185 (M.D. Tenn. 1981), *citing Goldman v. Sears, Roebuck & Company,* 607 F.2d 1014 (1st Cir. 1979), *cert. denied,* 445 U.S. 929 (1980).

11. As a matter of law, plaintiff's assertion that he is entitled to litigate the question of whether the failure to rehire him after the termination of his recall rights was

discriminatory also must be rejected. That allegation was not made in the EEOC charge, and thus plaintiff has failed to comply with the statutory prerequisite to a suit under Title VII. *Anderson v. Paccar, Inc., supra.*

12. Furthermore, as a matter of law, plaintiff has failed to establish that the transfer of a current employee into the first Oiler-Truck Driver position which became open was an act of racial discrimination against plaintiff. Thus, summary judgment on the merits in favor of defendant is warranted with respect to plaintiff's failure to rehire claim.

13. Any Finding of Fact which properly should be a Conclusion of Law, is included herein as a Conclusion of Law as though fully set forth.

DATED: 7/20/83

CONSUELO B. MARSHALL, Judge
United States District Court

APPENDIX E

Judgment

CASE NO. CV 80-4637CBM(Mx)

Filed July 20, 1983, Clerk, U.S. District Court, Central District of California. Entered July 26, 1983, Clerk, U.S. District Court, Central District of California.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, JOHN H. STEWART, Plaintiff, vs. DISNEYLAND, A Division of Walt Disney Productions, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 235, Defendants.

The motions of Defendants DISNEYLAND and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 235 (hereinafter "Local 952") for summary judgment came on for hearing before the Honorable Consuelo B. Marshall, Judge, presiding, on April 5, 1982, Cynthia E. Gitt appearing for Defendant DISNEYLAND, Paul Crost for Defendant Local 952, and Edward E. Washington for Plaintiff John H. Stewart. Having reviewed the papers and documents in support of and in opposition to defendants' motions for summary judgment, and having heard argument on the matters, it appears that no material issue of fact exists in opposition to Defendants DISNEYLAND and Local 952's motions for summary judgment.

THEREFORE, IT IS HEREBY ORDERED that summary judgment be entered in favor of Defendants DISNEYLAND and Local 952 as to all causes of action against the moving defendants.

DATED: 7/20/83

CONSUELO B. MARSHALL, Judge
United States District Court

APPENDIX F

APPENDIX A

No. 82-5608

D.C. No. CV 80-4637-CBM

Filed September 6, 1984, Phillip B. Wineberry, Clerk, U.S. Court of Appeals.

In the United States Court of Appeals, For The Ninth Circuit, JOHN H. STEWART, Plaintiff/Appellant, vs. Disneyland, Division of Walt Disney Productions; and International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America, Local 235, Defendants/Appellees.

On Appeal from the United States District Court for the Central District of California, The Honorable Consuelo B. Marshall, District Judge, Presiding. Argued and submitted July 2, 1984.*

*Before: ANDERSON and FERGUSON, Circuit Judges, and SOLOMON,** District Judge.*

John H. Stewart appeals from a grant of summary judgment to Disneyland and Local 235, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America (Teamsters), in an action alleging discrimination under Title VII of the Civil Rights Act of 1964. We affirm.

BACKGROUND

John Stewart, a black man, began working for Disneyland in June, 1959, as a janitor. In March, 1971, he transferred to an oiler-truck driver position. Upon transferring, Stewart gave up the seniority he gained as a janitor and

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

**The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

APPENDIX B

Filed November 6, 1984, Phillip B. Wineberry, Clerk, U.S. Court of Appeals.

In the United States Court of Appeals for the Ninth Circuit.

JOHN H. STEWART, Plaintiff/Appellant, vs. DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, LOCAL 235, Defendants/Appellees.

No. 82-5608

D.C. No. CV 80-4637-CBM

Before: *ANDERSON and FERGUSON, Circuit Judges, and SOLOMON,* District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.